DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CERE-MC

8 May 1992

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Amendment to Real Estate Policy Guidance Letter No. 4

1. References:

a. Memorandum, CERE-MC, 13 Sep 91, subject: Real Estate Policy Guidance Letter No. 4 -- Environmental Considerations in the Permitting, Outgranting, Transfer, or Disposal of Non-Military Real Property under Control of the Army Corps of Engineers.

b. Memorandum, ENVR-EH, 1 Nov 90, subject: Real Property Transactions and Preliminary Assessment Screenings (PAS).

2. Paragraph 3d(3) of Real Estate Policy Guidance Letter No. 4 (Reference 1a) is amended by striking out the last sentence. Decisions regarding categorical exclusions need not be forwarded to CERE-MC.

3. For purposes of performing the PAS on civil works property, the definition of "Transfer" in Revised AR 200-1 (contained in Reference 1b) will apply, except that the phrase "minor licenses granted by the installation commander incident to post administration" should be read as "minor licenses granted by the District Commander incident to project management." Shoreline management permits are not subject to the PAS requirement, since they are not transfers of interests in real property.

4. Many in the field have expressed concern over the "requirement" to perform a site inspection in order to complete the PAS. Paragraph 12f of Reference 1b states: "Items to be considered during the PAS process should include...(5) Visual Site Inspection[.]" (emphasis added) Discussions with the proponent of Reference 1b, the Army Environmental Office, indicate that the Visual Site Inspection is not an absolute requirement, and should be performed only when the records search, or other evidence, indicates a possibility that hazardous substances were stored on the property.

5. This office is currently discussing additional changes and improvements to the PAS procedure with the Army Environmental Office and other interested elements. Among the items being

CERE-MC 8 May 1992
SUBJECT: Amendment to Real Estate Policy Guidance Letter No. 4

discussed are establishment of a standardized PAS format and a refined definition of "transfer." These forthcoming changes should clarify and streamline the District's responsibilities and procedures in performing this function. Your patience and efforts in attempting to implement this important program, with limited guidance, are appreciated.

FOR THE DIRECTOR:

S. JANICE HOWELL
Chief, Management and Disposal Division
Directorate of Real Estate

DISTRIBUTION:

COMMANDER
LOWER MISSISSIPPI VALLEY DIVISION, ATTN: CELMV-RE-M
MISSOURI RIVER DIVISION, ATTN: CEMRD-RE-M
NEW ENGLAND DIVISION, CENED-RE-M
NORTH ATLANTIC DIVISION, ATTN: CENAD-RE-M
NORTH CENTRAL DIVISION, ATTN: CENCD-RE-M
NORTH PACIFIC DIVISION, ATTN: CENPD-RE-M
OHIO RIVER DIVISION, ATTN: CEORD-RE-M
PACIFIC OCEAN DIVISION, ATTN: CEPOD-RE-M
SOUTH ATLANTIC DIVISION, ATTN: CESAD-RE-M
SOUTH PACIFIC DIVISION, ATTN: CESPD-RE-M
SOUTHWESTERN DIVISION, ATTN: CESWD-RE-M

MEMPHIS DISTRICT, ATTN: CELMM-RE
NEW ORLEANS DISTRICT, ATTN: CELMN-RE-M
ST. LOUIS DISTRICT, ATTN: CELMS-RE-M
VICKSBURG DISTRICT, ATTN: CELMK-RE-M
KANSAS CITY DISTRICT, ATTN: CEMRK-RE-M
OMAHA DISTRICT, ATTN: CEMRO-RE-M
BALTIMORE DISTRICT, ATTN: CENAB-RE-M
NEW YORK DISTRICT, ATTN: CENAN-RE-M
NORFOLK DISTRICT, ATTN: CENAO-RE-M
CHICAGO DISTRICT, ATTN: CENCC-RE
DETROIT DISTRICT, ATTN: CENCE-RE-M
ROCK ISLAND DISTRICT, ATTN: CENCR-RE-M
ST. PAUL DISTRICT, ATTN: CENCS-RE-M
ALASKA DISTRICT, ATTN: CENPA-RE-M
PORTLAND DISTRICT, ATTN: CENPP-RE-M
SEATTLE DISTRICT, ATTN: CENPS-RE-M
WALLA WALLA DISTRICT, ATTN: CENPW-RE-M
HUNTINGTON DISTRICT, ATTN: CEORH-RE-M

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CERE-MC (405-80) 13 September 1991

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Real Estate Policy Guidance Letter No. 4 -- Environmental considerations in the Permitting, Outgranting, Transfer, or Disposal of Non-Military Real Property under the Control of the Army Corps of Engineers

1. References:

a. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); 42 USC 9601 et. seq., see especially, Section 9620 (h);

b. "Reporting Hazardous Substance Activity When Selling or Transferring Federal Real Property", found at 40 CFR Part 373, for additional background see Federal Register Volume 55, Number 73, page 14208, published 16 April 1990;

c. AR 200-1, "Environmental Protection and Enhancement", as amended by Memorandum from ENVR-EH, to CEMP-RI dated 1 Nov 1990, Subject: Real Property Transactions and Preliminary Assessment Screenings (PAS);

d. AR 200-2, "Environmental Effects of Army Actions";

e. 41 CFR 101-47, Utilization and Disposal of Real Property, see especially subsections 101-47.202-2, 101-47.203-7, 101-47.304-14, 101-47.307-2, and 101-47.401-4, for additional background see Federal Register Volume 56, Number 72, page 15048, published 15 April 1991;

f. ER 200-2-2, "Procedures for Implementing NEPA";

g. ER 405-1-12; Chapter 11, "Disposal", see especially paragraphs 11-6, 11-19, 11-123 and 11-127;

h. ER 405-1-12; Chapter 8, "Real Property Management", see especially paragraphs 8-2, 8-3, and 8-5;

2. References 1g and h, identify the information that is to be included in all disposal and outgrant assemblies. Both of these suggest that environmental factors be considered before real estate disposals or outgrants are executed. However, each regulation takes a different approach to ensuring compliance with the relevant environmental laws.

3. The regulations discussed in paragraph 2 were written before the full impact of some of the environmental laws was realized. Accordingly, there is a lack of uniform consideration of environmental factors in the transferring, disposal, and outgranting of non-military real property under the control of the Army Corps of Engineers. These variations present a potential source of problems in assuring the Corps' compliance with the various environmental laws. In order to correct this situation the following procedures are effective immediately:

a. The Real Estate file for any action involving the permitting, outgranting, transfer, or disposal of any interest in non-military real property, and the transmittal assembly if the action must be forwarded to higher headquarters, will contain a statement identifying the environmental review that was conducted, when it was done, and by whom it was reviewed. The environmental requirements with which we must comply fall into three general groups; they are to be addressed separately and specifically: (i) NEPA; (ii) Other environmental laws, compliance with which is required notwithstanding NEPA; and, (iii) CERCLA, especially 42 USC 9620 (h).

b. Compliance with NEPA:

(1) Depending on the impacts of the proposed action, the environmental review required by NEPA will be either: (i) A Record of Environmental Consideration (REC); (ii) An Environmental Assessment (EA) with a Finding of No Significant Impact (FONSI); or (iii) an Environmental Impact Statement (EIS). There may also be cases where both an EA and an EIS are prepared.

(2) When an action qualifies as a Categorical Exclusion (CX), an REC, following the format discussed in reference 1d, shall be included, along with a citation to the section of the regulation, reference 1f, that provides for this type action to be a CX. The REC may be executed by the Chief of Real Estate.

c. To show compliance with environmental laws whose requirements are not subsumed in NEPA, the Real Estate file and the transmittal assembly should indicate if there has been compliance with any of the following statutes and Executive Orders which are applicable. It should be noted, some of the following are applicable in all cases while others may not be.

(1) The National Historic Preservation Act, 16 USC 470 et seq.;

(2) The Coastal Zone Management Act, 16 USC 1451 et seq.;

(3) The Endangered Species Act, 16 USC 1536 et seq.;

(4) The Clean Water Act, 33 USC 1251 et seq., including the Section 404 wetlands permitting process and Section 311;

(5) The Wild and Scenic Rivers Act, 16 USC 1271 et seq.;

(6) The Clean Air Act, 42 USC 7401 et seq.;

(7) The Antiquities Act, 16 USC 431 et seq.;

(8) Archeological and Historic Preservation Act, 16 USC 469;

(9) American Indian Religious Freedom Act, 42 USC 1996;

(10) Archeological Resources Protection Act, 16 USC 470aa-11;

(11) Toxic Substances Control Act, 15 USC 2601;

(12) The Solid Waste Disposal Act, 42 USC 6901, (This is also known as RCRA the Resource Conservation and Recovery Act);

(13) Federal Insecticide, Fungicide, and Rodenticide Act, 7 USC 135;

(14) Executive Order 11990, Protection of Wetlands; and,

(15) Executive Order 11988 as amended by Executive Order 12148, Floodplain Management.

d. Compliance with CERCLA:

(1) Compliance with CERCLA will be documented by including in each file and assembly for the outgranting, transfer, permitting, or disposal of real property or an interest therein, a Preliminary Assessment Screening (PAS) as that procedure is described in reference 1c, substituting for the military command structure the appropriate Civil Works approval channel. The Report of Availability required by references 1. g. (paragraph 11-19) and h. (paragraph 8-3) are to be combined with the PAS and included in each file and assembly.

(2) If it is determined that no activity took place on the property involving amounts of a hazardous substance above the CERCLA threshold levels, then language substantially in accordance with that found in 41 CFR 101-47.202-2 (b) (10) (iii) should be included in the PAS. A PAS is prepared for a specific action (e.g. the outgranting of a particular parcel of land) and should not be confused with Environmental Inventories of a generalized nature such as the Environmental Review Guide for Operations (ERGO). An example of a PAS, without attachments, is enclosed.

(3) Categories of actions such as those involving renewals of outgrants that have previously been subjected to a PAS, and minor outgrants, such as licenses for boat ramps or docks may be excluded from the PAS requirements by the District Engineer, provided that: (i) He first obtains the concurrence of the Division Engineer; (ii) The amount of land involved is minimal; and, (iii) The use being permitted is unlikely to cause any environmental damage or significant disturbance to the site. A copy of such decision specifying the type(s) of actions to be so excluded with the concurrence of the Division Engineer shall be forwarded to CERE-MC, and the implementation of such decision shall be held in abeyance for 30 days after transmittal by Division to HQUSACE.

(4) You should keep in mind, when considering compliance with CERCLA and RCRA, that federal agencies are legally obliged to follow state law and procedure implementing these laws, and that state law under an EPA approved RCRA program may determine the definition of, for example, "hazardous substances".

(5) CERCLA, reference 1a, requires that all "transfers" (in the context of this act this term should be read broadly and not as a term of art meaning an interagency transfer of accountability) of real property from the Federal Government to another party, including another federal agency, must contain in the "contract" for the transfer a notice indicating if the property had been the site of a release, storage, or disposal of hazardous substances (see enclosure). There is to be a "complete search of agency files" to determine if a notice is needed. Additionally, if there was a release, storage, or disposal, the notice is to identify the nature of the substance involved, when the substance was on the property, and a description of the remedial action taken. For the purposes of this guidance sales contracts, leases, easements, permits and all other outgrant and disposal documents are "contracts for the transfer of real property".

(6) The Environmental Protection Agency has issued regulations implementing Section 9620, see reference 1b. The regulations do not diminish the all inclusive nature of the language of the act.

(7) CERCLA also requires that two covenants be included in all "deeds" transferring an interest in real property from the Federal Government to another party, if there has been a release, storage, or disposal of more than the specified amounts of a hazardous substance (reference 1. b.). One covenant warrants that "all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer . . . ". The second covenant warrants that, "... any additional remedial action found to be necessary after the date of [the] ... transfer shall be conducted by the United States."

(8) The records search required by CERCLA is to be a complete search of the agency records (see reference 1b). Therefore, the District should have in its files, written confirmation of such a search, from all elements of the District (or Division) e.g. operations, construction, safety, logistics, planning, etc. that might have records indicating if the CERCLA "threshold" (reference 1b) on the quantity of hazardous substances has been crossed.

(9) If the records check indicates that the "threshold" for reporting the storage, release, or disposal of hazardous substances has not been exceeded, and there is no other actual or constructive notice indicating that it has, a deed for the transfer of such property from the Federal Government need not contain language referencing CERCLA i.e., 42 USC 9620.

(10) When a PAS is completed pursuant to an outgrant it should be signed by both the Government and the grantee and retained in the files until the outgrant ends or is terminated. The initial PAS will then form the baseline in determining responsibility for any future restoration work. At the conclusion of the outgrant a PAS and such other investigations as are warranted should be completed to determine what if any environmental restoration work is needed.

4. Care should be taken to ensure that compliance with the environmental statutes is adequately documented both to prevent potential financial liability to the Government, and because several of the laws (e.g. RCRA and CERCLA) have provisions whereby individual employees of industry and government may be held personally liable for their acts or omissions that violate the laws. Such liability may be both civil and criminal depending on the facts of the case. (Please see enclosed cases)

5. Effective immediately no outgrant, permit, disposal, or transfer of any non-military real property or interest therein shall be processed or forwarded to higher echelons for approval, that does not comply with the guidance included herein.

FOR THE COMMANDER:

B. J. FRANKEL
Director of Real Estate

Encl

CERE-MC (405-80) 13 September 1991
SUBJECT: Real Estate Policy Guidance Letter No. 4 -- Environmental considerations in the Permitting, Outgranting, Transfer, or Disposal of Non-Military Real Property under the Control of the Army Corps of Engineers

DISTRIBUTION:
COMMANDER
LOWER MISSISSIPPI VALLEY DIVISION, ATTN: CELMV-RE
MISSOURI RIVER DIVISION, ATTN: CEMRD-RE
NEW ENGLAND DIVISION, ATTN: CENED-RE
NORTH ATLANTIC DIVISION, ATTN: CENAD-RE
NORTH CENTRAL DIVISION, ATTN: CENCD-RE
NORTH PACIFIC DIVISION, ATTN: CENPD-RE
OHIO RIVER DIVISION, ATTN: CEORD-RE
PACIFIC OCEAN DIVISION, ATTN: CEPOD-RE
SOUTH ATLANTIC DIVISION, ATTN: CESAD-RE
SOUTH PACIFIC DIVISION, ATTN: CESPD-RE
SOUTHWESTERN DIVISION, ATTN: CESWD-RE

CF:
COMMANDER
MEMPHIS DISTRICT, ATTN: CELMM-RE
NEW ORLEANS DISTRICT, ATTN: CELMN-RE
ST. LOUIS DISTRICT, ATTN: CELMS-RE
VICKSBURG DISTRICT, ATTN: CELMK-RE
KANSAS CITY DISTRICT, ATTN: CEMRK-RE
OMAHA DISTRICT, ATTN: CEMRO-RE
BALTIMORE DISTRICT, ATTN: CENAB-RE
NEW YORK DISTRICT, ATTN: CENAN-RE
NORFOLK DISTRICT, ATTN: CENAO-RE
CHICAGO DISTRICT, ATTN: CENCC-RE
DETROIT DISTRICT, ATTN: CENCE-RE
ROCK ISLAND DISTRICT, ATTN: CENCR-RE
ST. PAUL DISTRICT, ATTN: CENCS-RE
ALASKA DISTRICT, ATTN: CENPA-RE
PORTLAND DISTRICT, ATTN: CENPP-RE
SEATTLE DISTRICT, ATTN: CENPS-RE
WALLA WALLA DISTRICT, ATTN: CENPW-RE
HUNTINGTON DISTRICT, ATTN: CEORH-RE
LOUISVILLE DISTRICT, ATTN: CEORL-RE
NASHVILLE DISTRICT, ATTN: CEORN-RE
PITTSBURGH DISTRICT, ATTN: CEORP-RE
JACKSONVILLE DISTRICT, ATTN: CESAJ-RE
MOBILE DISTRICT,ATTN: CESAM-RE
SAVANNAH DISTRICT, ATTN: CESAS-RE
LOS ANGELES DISTRICT, ATTN: CESPL-RE
SACRAMENTO DISTRICT, ATTN: CESPK-RE
ALBUQUERQUE DISTRICT, ATTN: CESWA-RE
FORT WORTH DISTRICT, ATTN: CESWF-RE
GALVESTON DISTRICT, ATTN: CESWG-RE

CERE-MC (405-80) 13 September 1991
SUBJECT: Real Estate Policy Guidance Letter No. 4 -- Environmental considerations in the Permitting, Outgranting, Transfer, or Disposal of Non-Military Real Property under the Control of the Army Corps of Engineers

LITTLE ROCK DISTRICT, ATTN: CESWL-RE
TULSA DISTRICT, ATTN: CESWT-RE

PRELIMINARY ASSESSMENT SCREENING (PAS)

1. REAL PROPERTY TRANSACTION: This project consists of the demolition and the disposal of the existing Industrial Wastewater Treatment Plant (IWTP). The existing IWTP was constructed in the 1940's and cannot meet the current treatment requirements for mobilization. A new IWTP has been constructed which will meet these requirements. All structures marked for demolition will be steam cleaned prior to demolition.

a. A COMPREHENSIVE RECORDS SEARCH ON 28 FEBRUARY 1991 included a review of the following areas:

1) Remedial Investigation Report for Lake City Army Ammunition Plant by Roy F Weston, Inc., May 1988.

2) Environmental Management Plan for the Lake City Army Ammunition Plant, October 1987.

3) Ground Water Quality Assessment Plan -- Industrial Wastewater Treatment Plant Settling Basins, Dames & Moore, December 1988.

4) Chemical Data For RCRA Ground Water Quality Assessment Plan -- IWTP Basins, Rainbow Envirochem, Inc, January - July 1990.

5) Concept Design Analysis -- Treatability Study for Wastewater Treatment Facilities -- Volume IV, Black & Veatch, November, 1984.

6) Wastewater Characterization Study -- MCA Project No. 24, Black & Veatch, August, 1988.

b. A SITE INVESTIGATION was performed on 28 February 1991 and evaluated the following areas:

1) Reviewed aerial photos from 1952, 1957 and 1975.

2) Visual inspection of existing IWTP.

3) Interviews with IWTP personnel at Lake City Army Ammunition Plant concerning historic use and operations of the IWTP and surrounding area.

4) Reviewed installation maps from 1971, 1976, and 1985.

3. A Summary of this PAS is provided in the Statement of Findings.

Signed: G. A. Abbott Date: 3/19/91
Prepared by: G. A. Abbott
Environmental Engineering

Signed: G. A. Abbott for T. J. Herman Date: 3/19/91
Approved by: T. J. Herman
Manager, Environmental Engineering

Signed: C. W. Melton Date: 3/19/91
Environmental Coordinator
Lake City Army Ammunition Plant

PAS-PN24

PAS STATEMENT OF FINDINGS

1. REAL PROPERTY TRANSITION: Demolition and disposal of existing Industrial Wastewater Treatment Plant (IWTP) at the Lake City Army Ammunition Plant.

2. COMPREHENSIVE RECORDS SEARCH: A records search was conducted on 28 February 1991 and consisted of the areas indicated on the PAS document. The following is a summary of the records search:

SUMMARY:

It is known that hazardous substances (waste oil) were treated in the existing IWTP. No documentation has been identified to date indicating spills or releases to the environment in relation to the structures which will be demolished at the existing IWTP.

The existing IWTP treated oil and grease since it was constructed in the 1940's. A new IWTP has been constructed to meet the current mobilization requirements.

During the period of 1970 to 1986 the wastewater from the explosive area, which contained a listed hazardous waste K046, (waste sludge from lead-based initiating compounds) was treated at the existing IWTP. This waste stream was diverted to a set of settling basins in the explosive area in March 1986. The settling basins, which were a part of the existing IWTP, were closed as a hazardous sludge storage facility in November 1988. The majority of the information in the record search identified the sludge storage basins. The existing IWTP was excluded from the hazardous waste closure because it was a tank system which discharged under a National Pollutant Discharge Elimination System (NPDES) permit.

The following are the existing structures to include the foundations and interconnecting piping to be demolished and transported offsite to a demolition landfill:

- Sludge and flocculation basins
- Building 1-024
- Scum and grease well
- Parshall flume
- Lift station east of building 1-024
- Mixing well
- Retention tank
- Flotation separator

Each existing facility containing wastewater or oil and grease shall be high-pressure steam cleaned. All wastewater removed prior to cleaning shall be conveyed to the equalization basins for disposal. All oil and grease and scum removed prior to cleaning shall be disposed of in the new oil and grease holding tank. The sludge removed from the sludge and flocculation basins shall be disposed of in the existing IWTP basins. Wastewater resulting from the steam cleaning shall be moved and conveyed to the equalization basins for further treatment.

Before removal of any structure, the soil beneath the structure will be sampled and tested for pH, total lead, zinc, copper, total oil and grease and Total Characteristic Leachate Procedure (TCLP) for lead. Access to the soil beneath the structure shall be by drilling or cutting a hole in the floor slab or structure botton.. The results of the soil tests shall be evaluated and any soil which is found to be hazardous will be transported to a licensed off-plant hazardous waste disposal facility. All demolition material will be disposed of in a licensed solid waste disposal facility.

3. SITE INSPECTION: A site inspection was performed on 28 February 1991 and involved the areas indicated on the PAS document. The following is a summary of the site inspection:

SUMMARY:

A review of aerial photography as well as a visual site inspection has not resulted in either the confirmation or the suspecting of unusual contamination other than the treatment of wastewater. A visual inspection was conducted and revealed no unusual land features, odors, stressed vegetation, etc. There are areas near the construction of the new IWTP where earth has been cut away and no contamination was observed.

4. FINDINGS:

A PAS was performed on 28 February 1991 to determine if any hazardous substances were stored or released that would prohibit the demolition and disposal of the existing IWTP. The conclusion of this PAS is that no specific or unusual environmental concerns have been identified that would significantly affect the disposal of the subject material offsite. Any contaminated material will be cleaned and rendered non-hazardous prior to disposal in an offsite licensed solid waste landfill. It is the finding of this PAS that the demolished material from the existing IWTP be disposed of offsite.

5. This PAS is a real property transaction record to serve as documentation for the hazardous substance contamination condition of the property. The proposed real property transaction of disposal of the existing IWTP material offsite should proceed as planned.

Signed: G. A. Abbott Date: 3/19/91
Prepared by: G. A. Abbott
Environmental Engineering

Signed: G. A. Abbott for T. J. Herman Date: 3/19/91
Approved by: T. J. Herman
Manager, Environmental Engineering

Signed: _____ Date: 3/19/91
Environmental Coordinator
Lake City Army Ammunition Plant

Signed: _____ Date: 25 MAR 91
Commanding Officer
Lake City Army Ammunition Plant

PAS-F

RECORD OF ENVIRONMENTAL CONSIDERATION (REC)

To: Gary Kelso

From: George Abbott

Project Title: Demolition and Disposal of the Existing Industrial Wastewater Treatment Plant (IWTP)

Brief Description: This project will consist of demolition and disposal of the existing IWTP. The debris from this project will be steam cleaned before disposal to a Sanitary Landfill. All wastewater from the cleaning operation will be discharged to the new IWTP. A Preliminary Assessment Screening (PAS) has been prepared.

Anticipated Date and/or Duration of Proposed Action: The estimated duration for this project is six months after receipt of funds. This project is being completed under PN-24 funds.

Reason for Using Record of Environmental Consideration:

This project has been adequately covered in an Environmental Assessment (EA) entitled Wastewater Treatment and Disposal Facilities at Lake City Army Ammunition Plant Jackson County Missouri dated December 1984. The EA may be reviewed at Lake City Army Ammunition Plant.

Signed: G. A. Abbott Date: 5/13/91
Prepared by: G. A. Abbott
Environmental Engineering

Signed: T J Herman Date: 5/13/91
Approved by: T. J. Herman
Manager, Environmental Engineering

Signed: Gary L. Kelso Date: 5/14/91
Environmental Coordinator
Lake City Army Ammunition Plant

29REC

U.S. v. DEE

U.S. Court of Appeals
Fourth Circuit

UNITED STATES OF AMERICA, Plaintiff - Appellee, versus WILLIAM DEE; ROBERT LENTZ; CARL GEPP, Defendants - Appellants, No. 89-5606, September 4, 1990

Resource Conservation and Recovery Act

Enforcement — Criminal (▸155.8010)

[1] Civilian employees of Army Department are not immune from prosecution for criminal violations of Resource Conservation and Recovery Act, because: (1) statute holds individuals liable; (2) employees were tried and convicted as individuals, not as agents of government; and (3) federal court decisions demonstrate that there is no general immunity from criminal prosecution for actions individuals take while in office.

Enforcement — Criminal (▸155.8010)

[2] Civilian employees of Army Department were properly found liable for knowingly violating Resource Conservation and Recovery Act, even though employees claimed that they did not know that violations were crime or that chemicals they handled were hazardous, because: (1) government was not required to prove that employees knew violation of RCRA was crime, and (2) court finds that evidence clearly shows that employees knew that chemicals were both "hazardous" and "wastes" under act. Court finds erroneous instruction to jury was harmless error in that jury would still have convicted employees if properly instructed.

Enforcement — Criminal (▸155.8010)

[3] Jury properly found civilian employees of Army Department liable for improper storage and disposal of dimethyl polysulfide under Resource Conservation and Recovery Act, even though employees claimed that chemical was not hazardous substance, because: (1) even though substance was not listed hazardous waste under RCRA, government argued that its ignitability made it hazardous, and (2) even though employees attempted to prove that flash point of substance was greater than 140 degrees Fahrenheit, jury had adequate evidence to conclude that it was sufficiently ignitable to be characteristic waste under RCRA. Court also concludes that substance was "waste" because it was in fact discarded in 1984.

Enforcement — Criminal (▸155.8010)

[4] Jury properly found civilian employee of Army Department liable for unpermitted storage and disposal of various hazardous chemicals in violation of Resource Conservation and Recovery Act, even though employee claimed that he was not in charge of operations at facility where chemicals were stored, because court finds that evidence showed employee was in charge of operations and that storage was crime even if it was negligent and inept rather than intentional.

Enforcement — Criminal (▸155.8010)

[5] Jury properly found civilian employees of Army Department liable for unpermitted treatment and disposal of various hazardous wastes in violation of Resource Conservation and Recovery Act, even though employees claimed that wastes went to sewage treatment facility and were therefore exempt from RCRA requirements, because, even if certain treatment and disposal activities were exempt, dumping of drum residues and incineration of methyl chloride were uncontested treatment and disposal violations.

Enforcement — Criminal (▸155.8010)

[6] Jury properly found civilian employees of Army Department liable for unpermitted storage and disposal of various chemicals in violation of Resource Conservation and Recovery Act, even though employees claimed that they inherited waste storage and disposal problems from prior waste managers, because: (1) regardless of whether they inherited problems, employees were responsible for maintaining area where chemicals were stored between 1983 and 1986, and (2) employees failed during that time to ensure that chemicals were managed in accordance with act.

On appeal of Resource Conservation and Recovery Act criminal convictions of three civilian employees of Army Department (DC Md, CR-88-211-HAR; Hargrove, J.); affirmed.

Michael A. Brown, Washington, D.C., and Richard Melvin Karceski, Baltimore, Md., for appellants.

Jane F. Barrett, asst U.S. atty, Baltimore, Md., for appellee.

Before James M. Sprouse and Robert F. Chapman, circuit judges, and Hiram H. Ward, senior district judge, Middle District of North Carolina, sitting by designation.

Full Text of Opinion

SPROUSE, Circuit Judge:

William Dee, Robert Lentz, and Carl Gepp (hereafter collectively "defendants") appeal the judgment of the district court entered after a jury trial finding them guilty of multiple violations of the criminal provisions of the Resource Conservation and Recovery Act ("RCRA" or "the Act"), 42 U.S.C. §§6901 *et seq.*[1] We affirm.

I

RCRA provides a comprehensive scheme for regulating storage, treatment and disposal of hazardous waste, requiring that it be managed to prevent leakage, spillage, hazardous chemical reactions, and migration of toxins into the soil, water, or air. In addition to administrative provisions, the Act creates criminal liability for persons who knowingly handle hazardous waste without a RCRA permit. 42 U.S.C. §6928(d).[2]

The defendant engineers were civilian employees of the United States Army assigned to the Chemical Research, Development, and Engineering Center at Aberdeen Proving Ground in Maryland. All the defendants were involved in development of chemical warfare systems. Gepp, a chemical engineer, was responsible for operations at and maintenance of the Pilot Plant;[3] Dee and Lentz were Gepp's superiors. Counts One through Three of the superseding indictment charged the defendants with violating the Act by illegally storing, treating and disposing of hazardous wastes at the Pilot Plant. Count Four focused on violations alleged to have occurred at the "Old Pilot Plant",[4] a separate building complex that was closed in 1978.[5]

Aberbeen Proving Ground acquired an umbrella RCRA permit for management of hazardous waste materials at the Proving Ground. Under the permit, three separate areas at Aberdeen were designated for storage of hazardous wastes; however, the permit did not allow storage, treatment, or disposal of hazardous wastes at the Pilot Plant or the Old Pilot Plant. Aberdeen in 1982 promulgated a regulation, APG 200-2, that established "policies and procedures for management and disposal of solid and hazardous waste materials at Aberdeen Proving Ground" and mandated compliance with all federal, state, interstate, and local regulations, specifically referencing both the RCRA statute and RCRA regulations.

APG 200-2 directed all tenant organizations, such as the Center, to report any waste material "suspected to be toxic, carcinogenic, caustic, ignitable, or reactive" by filling out a form known as a "hard card." Upon receipt of the hard card, designated Aberdeen organizations were responsible for transporting hazardous wastes to the permitted[6] storage areas. APG 200-2 was specific and thorough, listing various individual chemicals and classes of chemicals that were likely to be hazardous, and reiterating that hazardous wastes were to be managed in accordance with all applicable laws.

In 1982, the Center issued a standard operating procedure, which in 1984 was reissued as a regulation known as CRDCR 710-1. It required identification of all RCRA wastes and directed that they be handled in accordance with the turn-in procedures of APG 200-2. Waste chemicals were defined as "those substances which have deteriorated to the point where they are no longer usable, are contaminated, or cannot be stored safely."

[1] The district court suspended each defendant's sentence and placed each on probation for three years with a condition of 1,000 hours of community service work.

[2] Paraphrased, the portion pertinent to this case reads: "Any person who knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter without a RCRA permit shall, upon conviction, be subject to fine and/or imprisonment." 42 U.S.C. §6928(d)(2)(a).

[3] The Pilot Plant complex included a four-story laboratory building, an administrative building, and storage sheds.

[4] The Old Pilot Plant included a laboratory building, an office building, scrubbing towers and a storage area.

[5] A fifth count charged defendants with violation of the Clean Water Act. 33 U.S.C. §§1251 *et seq.* The jury could not reach a verdict with respect to this court.

[6] In regulatory parlance and as used in this opinion, "permitted" means an activity for which a valid permit has been issued. Conversely, "unpermitted" means the activity is not authorized by the facility's permit, or that the facility does not have a permit.

As heads of their respective departments, defendants were responsible for ensuring that the provisions of APG 200-2, CRDCR 710-1, and RCRA were fulfilled within their departments, and that their subordinates were aware of and in compliance with those regulations. Defendants admitted knowledge of APG 200-2, CRDCR 710-1, and RCRA.

II

The defendants first contend that they are immune from the criminal provisions of RCRA because of their status as federal employees working at a federal facility. Because 42 U.S.C. §6928(d) defines those liable as "any person who" knowingly violates the Act, and because neither the United States nor an agency of the United States is defined as a person, defendants maintain they cannot be "persons" in the sense contemplated by §6928(d). They assert that by reason of their employment by the federal government they are entitled to its sovereign immunity, meaning they are immune from this criminal prosecution.

[1] There is simply no merit to this suggestion. The Act defines "person" as

> an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.

42 U.S.C. §6903(15). The definition begins with an inclusion of "an individual" as a person. The defendants, of course, were indicted, tried, and convicted as individuals, not as agents of the government. Suffice it to say that sovereign immunity does not attach to individual government employees so as to immunize them from prosecution for their criminal acts. *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974); *cf. Butz v. Economou*, 438 U.S. 478, 506 (1978) ("all individuals, whatever their position in government, are subject to federal law"). Even where certain federal officers enjoy a degree of immunity for a particular sphere of official actions, there is no general immunity from criminal prosecution for actions taken while serving their office. *United States v. Hastings*, 681 F.2d 706, 710-712 (11th Cir. 1982) ("A judge no less than any other man is subject to the processes of the criminal law"), *cert. denied*, 459 U.S. 1203 (1983); *United States v. Diggs*, 613 F.2d 988, 1001 (D.C. Cir. 1979) ("Article I, §5 does not immunize a member of Congress from the operations of the criminal laws"), *cert. denied*, 446 U.S. 982 (1980). *See generally United States v. Isaacs*, 493 F.2d 1124, 1142-44 (7th Cir.) ("Criminal conduct is not part of the necessary functions performed by public officials"), *cert. denied*, 417 U.S. 976 (1974).[1]

III

Defendants next contend that they did not "knowingly" commit the crimes proscribed by RCRA. *See* 42 U.S.C. §6928(d). They claim that there was insufficient evidence to show that they knew violation of RCRA was a crime; also, that they were unaware that the chemicals they managed were hazardous wastes.

The Supreme Court has repeatedly rejected similar arguments in cases involving regulation of dangerous materials, applying the familiar principle that "ignorance of the law is no defense." *United States v. International Minerals &*

---

[1] Because defendants were prosecuted as individuals, their argument as to the scope of Congress's waiver of immunity under 42 U.S.C. §6961 is inapposite. The same may be said of their reliance on *California v. Walters*, 751 F.2d 977 (9th Cir. 1984), which involved an attempt by the City of Los Angeles to prosecute a federal agency and its administrator under California hazardous waste law. The Ninth Circuit held that, although 42 U.S.C. §6961 directs federal agencies to comply with state hazardous waste laws, Congress did not intend to waive the United States' sovereign immunity to criminal sanctions.

Walters does not apply here for two reasons. First, unlike the case *sub judice*, *Walters* involved an action against a federal agency and its administrator in his official capacity. The *Walters* court expressly warned: "Our decision is compelled by the parties' agreement that the action is essentially one against the United States. Our holding in this case does not necessarily apply in all cases to prosecutions against federal officers or federal agencies." *Id.* at 979.

Second, *Walters* involved an attempt by a state to enforce state law against a federal agency and its officer. In certain circumstances, federal officers may avoid criminal prosecution by a state when the alleged crime arose from performance of federal duties. *Cunningham v. Neagle*, 135 U.S. 1, 75-76 (1890). *Morgan v. California*, 743 F.2d 728, 731 (9th Cir. 1984). The supremacy clause concerns which give rise to *Neagle*-type immunity are not implicated in this case, which involves prosecution for federal crimes by the federal government.

Chem. Corp., 402 U.S. 558, 563 (1971); *United States v. Freed*, 401 U.S. 601, 607–10 (1971); *United States v. Dotterweich*, 320 U.S. 277, 280–81 (1943); *United States v. Balint*, 258 U.S. 250 (1922). We agree with the Eleventh Circuit that this time-honored rule applies to prosecutions under RCRA. *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1502–03 [24 ERC 1282] (11th Cir. 1986); *see also United States v. Hoflin*, 880 F.2d 1033, 1036–39 [30 ERC 1419] (9th Cir. 1989), *cert. denied*, 110 S.Ct. 1143 (1990); *cf. United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 669 [21 ERC 1433] (1984), *cert. denied*, 469 U.S. 1208 (1985). "[W]here, as here . . . , dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *International Minerals*, 402 U.S. at 565.

[2] Therefore, the government did not need to prove defendants knew violation of RCRA was a crime, nor that regulations existed listing and identifying the chemical wastes as RCRA hazardous wastes. However, we agree with defendants that the knowledge element of §6928(d) does extend to knowledge of the general hazardous character of the wastes. Among its jury instructions, the district court included one that advised:

> The government must prove beyond a reasonable doubt that each defendant knew that the substances involved were chemicals. However, the government need not establish that the defendants knew that these chemicals were listed or identified by law as hazardous waste
>
> . . . .

While these statements are correct, it was error to instruct the jury that defendants had to know the substances involved were chemicals, without indicating that they also had to know the chemicals were hazardous. *See Hoflin*, 880 F.2d at 1039; *Johnson & Towers*, 741 F.2d at 668; *compare United States v. Greer*, 850 F.2d 1447, 1450 [28 ERC 1254] (11th Cir. 1988) (jury instructed that defendant had to know the chemical waste had potential to harm others or the environment). However, we think the error was harmless. The record reflects overwhelming evidence that defendants were aware they were dealing with hazardous chemicals. *See Pope v. Illinois*, 481 U.S. 497, 501–03 (1987); *Rose v. Clark*, 478 U.S. 570, 576–79 (1986) (conviction should stand if the reviewing court can confidently say that no rational juror, if properly instructed, could have found for defendant).[9] Contrary to defendants' assertions, the evidence also clearly established that the materials they handled were "wastes" as that term is used in the statute.[9]

IV

In addition to the preceding general challenges to their convictions, defendants raise issues specific to each count.

Count One charged defendants with unpermitted storage and disposal of a hazardous waste — dimethyl polysulfide — at the Pilot Plant from June 1983 to August 1984. Gepp and Lentz were found guilty of this count.

Dimethyl polysulfide is a chemical the Center had considered as a component for a binary chemical weapon.[10] During the 1970s, the Center produced dimethyl polysulfide at the Pilot Plant and also purchased some from chemical companies. In 1980, 200 canisters of dimethyl polysulfide were brought to the Pilot Plant from Fort Sill, Oklahoma, because they were leaking. All the dimethyl polysulfide was stored on the fourth floor of the Pilot Plant. Included were batches that had tested to be "bad" or "off-spec."

By 1981, the chemical weapon program which would have used the dimethyl polysulfide was cancelled. No more dimethyl polysulfide was produced, and no projects which would use dimethyl polysulfide were planned. In May 1983, a safety inspector warned Lentz and Gepp that the roof of the Pilot Plant might collapse and that they should move the dimethyl polysulfide, but no action was taken. Four months later, a corner of the Pilot Plant did collapse, crushing several

[9] We find no merit to the other contentions raised by the defendants in connection with the district court's instructions. As a whole, the instructions "fairly and adequately state[d] the pertinent legal principles involved." *See Hogg's Oyster Co. v. Unites States*, 676 F.2d 1015, 1019 (4th Cir. 1982).

[9] Defendants' self-serving argument that materials were not wastes until they declared them wastes is without merit. Furthermore, the evidence demonstrated that defendants considered some if not all of the chemicals listed under each count to be wastes because they ordered their disposal.

[10] Binary weapons make use of two chemicals, neither of which is lethal by itself, but which combine to form a lethal agent.

drums so that dimethyl polysulfide spilled and drained into the floor drains.

For the next several months, employees complained frequently to Lentz and Gepp about noxious odors from the dimethyl polysulfide, but not until the Spring of 1984 did Gepp direct employees to move the containers of dimethyl polysulfide outside and to fill out hard cards on them. Gepp did not turn in the hard cards to the proper Aberdeen office until August 1984.

[3] Defendants contend that dimethyl polysulfide is not a hazardous waste. It is not a listed hazardous waste,[11] but the government's theory at trial was that the dimethyl polysulfide handled by defendants came within the definition of a "characteristic" hazardous waste, because its "flash point" was less than 140° F.[12] Defendants argue that there was insufficient evidence to prove that dimethyl polysulfide had a flash point of less than 140° F, because a defense witness testified that he had conducted tests on dimethyl polysulfide which indicated flash point of 154° to 163° F. Cross-examination of the witness, however, reflected irregularities in his testing procedures. Additionally, the government introduced the following evidence: a Material Safety Data sheet supplied by a manufacturer of dimethyl polysulfide indicating a flash point of 104° F; testimony by the person who had transported the dimethyl polysulfide from Fort Sill that he had seen a Material Safety Data Sheet listing the flash point as 124° F; and the "hard card" which Gepp filled out on the dimethyl polysulfide listing the flash point as being between 61° and 100° F. In our view this evidence easily supports the jury verdict which implicitly found that dimethyl polysulfide was a characteristic hazardous waste. *Cf. Greer*, 850 F.2d at 1452 (evidence sufficient to support jury's conclusion that waste material was 1,1,1 trichloromethane).

Defendants also contend the dimethyl polysulfide was a "waste" because it was still usable, *i.e.*, that it was not prudent to discard it because it conceivably could be of value to the weapons program at some time in the future. This argument is controverted by the fact that the defendants disposed of the dimethyl polysulfide in 1984.[13]

Count Two charged defendants with unpermitted storage and disposal of hazardous wastes at the Pilot Plant compound from June 1983 to April 1986. Only Gepp was convicted of the violations alleged in this count.

The United States Coast Guard had developed a program called the Chemical Hazard Response Information System (CHRIS) project. As part of the project, the Coast Guard contracted with the Center to study various hazardous chemicals in order to develop a manual for effectively responding to spills of those chemicals. At Gepp's direction, many excess and leftover CHRIS chemicals were placed in a shed in the Pilot Plant complex. Others were stored at various locations about the Pilot Plant.

On a number of occasions from 1980 to 1986, Gepp was informed by employees and safety inspectors that there were problems with the stored CHRIS chemicals, including corrosion and breakage of containers, leaks and spills, generation of fumes, and proximity of incompatible chemicals. Gepp either made no response to these warnings or merely told staff to clean it up as best they could. Finally, in 1986, the commander of the Center ordered operations at the Pilot Plant halted and the complex cleaned up. Hundreds of different chemicals were removed and taken to the Aberdeen hazardous waste storage facility. Other chemicals had to be destroyed by detonation because they were too unstable to be transported.

[4] Gepp concedes that the chemicals were hazardous and that there was no use for them, but he asserts there was "little evidence" that he directed the storage or disposal operations. The government's evidence, however, shows that Gepp was in charge of operations at the Pilot Plant and that Gepp originally ordered the placement of leftover CHRIS chemicals in the storage shed. Gepp repeatedly ignored warnings about the hazardous condition of the CHRIS chemicals and other chemicals that were improperly stored about the Pilot Plant. He undertook no actions to comply with RCRA in the storage and disposal of the chemicals prior to the 1986 cleanup.

---

[11] *See* 40 C.F.R. Part 261, Subpart D.

[12] *See* 40 C.F.R. §261.21.

[13] It is perhaps worth nothing that RCRA does not require disposal of hazardous wastes. Prudent retention of a waste in the hope it will someday be a treasure is permissible if it is stored in accordance with a RCRA permit. *See* 40 C.F.R. §261.2(e)(2)(iii).

...However, we ...ssue, because defen... that the government ...itted treatment and ...s wastes at the Pilot ...wastes on the ground ...ethyl chloride."[7] ...defendants with un... ...l disposal of hazard... ...ld Pilot Plant from ...st 1986. Lentz and ...ty on this count. ...it had been used for ...y experiments. Op... ...n 1978, with chemi... ...arious buildings. ...hen they became ...d Pilot Plant, Lentz ...e on several occa... ...tors that improper ...the Old Pilot Plant ...and that the chemi... ...l in accordance with ...Lentz had an em... ...p plan for the Old ..., hazardous waste ...storage there until ...z admitted at trial ...of the storage prob... ...Plant; Dee stated he ...p of the building a ...

...on... ...eir convic... ...ming that ...vironmental ...n... ...rders on the ...ent charged defen... ...l storage of hazard... ...l Pilot Plant from ...986. There is sub... ...record that during ...

...exclusion, the wastes ...ld have to mix with ...iences prior to enter... ...facility. *See Comite ...uerto Rico Aqueduct &* ...0, 184-86 [30 ERC ...mestic sewage exclu... ...anitary waste come ...d to bathrooms used ...110 S.Ct. 1476 [30 ...ermore, the sewage ...a "publicly owned ...term is defined by ...260.10. ...ch appellants' argu... ...ls were not detected ...he sumps. We note, ...ly prohibits unper... ...us wastes. The con... ...fter disposal has no ...isposal was illegal.

this time period defendants were responsible for maintenance of the Old Pilot Plant, that they were aware of the hazardous condition of chemical storage there, and that they failed to ensure that the hazardous wastes were managed in accordance with RCRA. Defendants may have inherited an environmental problem, but their criminal culpability arises solely from their own ongoing failure to comply with RCRA during the period they were responsible for the Old Pilot Plant.

IX

In view of the above, the judgment of the district court is *AFFIRMED.*

FMC CORP. v. COMMERCE DEPARTMENT

U.S. District Court
Eastern District of Pennsylvania

FMC CORPORATION v. UNITED STATES DEPARTMENT OF COMMERCE, et al., No. 90-1761, July 18, 1990

Comprehensive Environmental Response, Compensation, and Liability Act

Liability — Owners, operators, and transporters (▸170.2510)

Liability — Scope of liability (▸170.2555)

[1] United States may be liable under Comprehensive Environmental Response, Compensation, and Liability Act as operator of Virginia facility that disposed of toxic wastes from rayon production during World War II, because: (1) facility owner alleged that United States micro-managed rayon industry during war by setting standards for level of output and buying facility's output, and (2) Congress intended to subject government agencies to same liability under CERCLA as applies to private parties.

On United States' motion to dismiss suit by rayon manufacturer claiming that government was liable for cost of cleaning up contamination under CERCLA; motion denied.

Neil G. Epstein, Philadelphia, Pa., for plaintiff.

Ronald Spritzer, Dept. of Commerce, Wash., D.C., for defendants.

Before Clarence C. Newcomer, district judge.

Full Text of Opinion

Before the court is the defendants'[1] motion to dismiss complaint pursuant to Fed.R.Civ.P. 12(b)(6) alleging that plaintiff FMC Corporation (FMC) has failed to state a claim upon which relief may be granted. For the reasons set forth below, the court will deny the motion.

I. Background

This case involves the assignment of liability and subsequent cleanup contributions for the disposal of toxic rayon dumping occurring during the Second World War. This case arises out of the application of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§9601-9675 (1983 & Supp. I 1990). Jurisdiction and venue is based on 42 U.S.C. §9613(b), which provides for jurisdiction in the United States district court and venue in any district in which the defendant resides.

FMC brings this action against the United States alleging that the government, through the War Production Board (WPB), is liable for a release of hazardous substances at FMC's rayon manufacturing facility prior to FMC's ownership. Under CERCLA, the United States may be liable for the release if it is found to be an "owner" or "operator" of a facility, or one who arranged (an "arranger") for the transportation or disposal of toxic materials. 42 U.S.C. §9607(a). In addition, liability may attach under CERCLA if a party's past actions contributed to the environmental damage even if that party is not currently in possession of the property or toxic substances. It is on this basis that FMC seeks to hold the United States liable under CERCLA. The United States now moves to dismiss the complaint.

---

[1] The defendants are the United States Department of Commerce; Robert Mosbacher, Secretary of Commerce; and the United States of America. In this Memorandum, the defendants will be collectively referred to as "the United States" or "the government."

Defendants assert there was insufficient evidence that management of the CHRIS chemicals was an environmental crime, because " 'Sloppy' storage procedures is [sic] not a crime." They are simply wrong. Negligent and inept storage of hazardous wastes is one of the evils RCRA was designed to prevent, and §6928(d) makes such egregious conduct a crime.

Count Three charged defendants with unpermitted treatment and disposal of hazardous wastes at the Pilot Plant from June 1983 to March 1986.[14] Lentz and Gepp were found guilty on this count.

Several sumps which collected materials from laboratories were located in the Pilot Plant. Periodically, the contents of the sumps were pumped to "neutralization tanks."[15] Between June 1983 and March 1986, numerous hazardous waste chemicals were dumped into the sumps at Gepp's direction. Additionally, at the direction of Gepp and Lentz, drums containing hazardous waste chemicals were cleaned by dumping the chemical onto the ground at the Pilot Plant, then rinsing the drum with acetone, alcohol or water, and dumping the rinsate onto the ground. Also, a Pilot Plant incinerator which was not permitted for incineration of hazardous waste was used to dispose of methyl chloride, which is a listed hazardous waste.

Lentz and Gepp contend that any disposal of hazardous wastes into the Pilot Plant sumps was exempt from the requirements of RCRA. The definition of solid waste excludes mixtures of domestic sewage and other wastes which go to a "publicly-owned treatment works." 40 C.F.R. §261.4(a). The Pilot Plant sumps fed into neutralization tanks that were connected to a sewer system that fed into a sewage treatment plant. Defendants therefore claim disposal into the Pilot Plant sumps was exempt from regulation under RCRA.

[5] Defendants have not pointed to evidence in the record establishing the factors of a §261.4(a) exclusion.[16] However, we need not decide the issue, because defendants do not dispute that the government proved other unpermitted treatment and disposal of hazardous wastes at the Pilot Plant — dumping of wastes on the ground and incineration of methyl chloride.[17]

Count Four charged defendants with unpermitted storage and disposal of hazardous wastes at the Old Pilot Plant from June 1983 to August 1986. Lentz and Dee were found guilty on this count.

The Old Pilot Plant had been used for bench-scale laboratory experiments. Operations there ceased in 1978, with chemicals left in storage in various buildings. Beginning in 1981, when they became responsible for the Old Pilot Plant, Lentz and Dee were warned on several occasions by safety inspectors that improper storage of chemicals at the Old Pilot Plant was creating a hazard and that the chemicals should be removed in accordance with APG 200-2. Although Lentz had an employee draft a cleanup plan for the Old Pilot Plant in 1983, hazardous waste chemicals remained in storage there until 1986. Dee and Lentz admitted at trial that they were aware of the storage problems at the Old Pilot Plant; Dee stated he did not consider cleanup of the building a priority.

[6] Lentz and Dee contest their convictions under Count Four claiming that they could not "inherit an environmental crime." This argument borders on the frivolous. The indictment charged defendants with unpermitted storage of hazardous wastes at the Old Pilot Plant from June 1983 to August 1986. There is substantial evidence in the record that during

[14] Count Two involved storage and disposal of leftover CHRIS chemicals at the Pilot Plant. Count Three involved separate treatment and disposal of other chemicals at the Pilot Plant.

[15] The tanks were able to neutralize simple acids and bases, but did not provide treatment for other types of hazardous waste.

[16] To come within this exclusion, the wastes from the Pilot Plant would have to mix with sanitary wastes from residences prior to entering the sewage treatment facility. *See Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct & Sewer Auth.*, 888 F.2d 180, 184-86 [30 ERC 1473] (1st Cir. 1989) (domestic sewage exclusion requires that the sanitary waste come from residences as opposed to bathrooms used by workers), *cert. denied*, 110 S.Ct. 1476 [30 ERC 2134] (1990). Furthermore, the sewage plant would have to be a "publicly owned treatment works," as that term is defined by RCRA. *See* 40 C.F.R. §260.10.

[17] We also need not reach appellants' argument that RCRA chemicals were not detected at "hazardous levels" in the sumps. We note, however, that RCRA flatly *prohibits* unpermitted disposal of hazardous wastes. The concentration of the wastes after disposal has no bearing on whether the disposal was illegal.

UNITED STATES of America, Appellee,

v.

David James CARR, Defendant-Appellant.

No. 1163, Docket 89-1009.

United States Court of Appeals, Second Circuit.

Argued May 9, 1989.

Decided July 25, 1989.

Defendant was convicted of failing to report release of prohibited amount of hazardous substance in violation of CERCLA by the United States District Court for the Northern District of New York, Howard G. Munson, J., and defendant appealed. The Court of Appeals, Pierce, Circuit Judge, held that: (1) statutory reporting requirement for persons "in charge" of facility extended to persons even of relatively low rank who are in position to detect, prevent and abate release of hazardous substances, and (2) jury instruction in regard to defendant's authority over area was proper.

Affirmed.

1. Health and Environment ⇐25.5(5.5)

Under provision in CERCLA which requires those "in charge" of facility to report release of hazardous substances, persons "in charge" include those, even of relatively low rank, who were in position to detect, prevent and abate release of hazardous substances. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 103, 42 U.S.C.A. § 9603.

2. Criminal Law ⇐822(1), 1134(3)

Appellate review of jury instruction in criminal matter challenged on appeal proceeds in two stages; first, appellate court must focus on specific language challenged, to determine whether it passes muster and thereafter, must review instructions as a whole to see if entire charge delivered correct interpretation of law.

3. Health and Environment ⇐42

Jury instruction to effect that if it was found that supervisor had any authority over either vehicle from which paint was dumped into pond or area, it would be sufficient to convict supervisor of failing to report release of prohibited amount of hazardous substance to appropriate federal agency in violation of CERCLA, was not improper; instruction explained that supervisor must have exercised supervisory control over facility in order to be held criminally liable for his failure to report release, but that he need not have exercised sole control over facility. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 103, 42 U.S.C.A. § 9603.

Jonathan B. Fellows (George H. Lowe, Bond, Schoeneck & King, Syracuse, N.Y., of counsel), for defendant-appellant.

J. Carol Williams, Attorney, Dept. of Justice, Washington, D.C. (Donald A. Carr, Acting Asst. Atty. Gen., Washington, D.C., Frederick J. Scullin, Jr., U.S. Atty. for the N.D.N.Y., Craig A. Benedict, Asst. U.S. Atty., David C. Shilton, Maria A. Iizuka, Attorneys, Dept. of Justice, Washington, D.C., of counsel), for appellee.

Before KEARSE, CARDAMONE, and PIERCE, Circuit Judges.

PIERCE, Circuit Judge:

Appellant David James Carr appeals from a judgment of the United States District Court for the Northern District of New York (Munson, J.), convicting him under section 103 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9603 (1982 & Supp. IV 1986). Under section 103, it is a crime for any person "in charge of a facility" from which a prohibited amount of hazardous substance is released to fail to report such a release to the appropriate federal agency. Appellant, a supervisor of maintenance at Fort Drum, New York, directed a work crew to dispose of waste cans of paint in an improper manner, and failed to report the release of the

hazardous substances—the paint—to the appropriate federal agency. At appellant's trial, the district court instructed the jury that appellant could be found to have been "in charge" of the facility so long as he had any supervisory control over the facility.

Appellant contends on appeal that this instruction was erroneous because (1) it extended the statutory reporting requirement to a relatively low-level employee, and (2) it allowed the jury to find that appellant was "in charge" so long as he exercised *any* control over the dumping. For the reasons stated below, we hold that the statutory reporting requirements were properly applied to appellant. We also hold that the jury instruction challenged on appeal, viewed as a whole, was not erroneous.

BACKGROUND

Appellant was a civilian employee at Fort Drum, an Army camp located in Watertown, New York. As a civilian employee at a military installation, he was supervised by Army officers. His position was that of maintenance foreman on the Fort's firing range, and as part of his duties he assigned other civilian workers to various chores on the range. In May 1986, he directed several workers to dispose of old cans of waste paint in a small, man-made pit on the range; at that time, the pit had filled with water, creating a pond. On Carr's instructions, the workers filled a truck with a load of cans and drove to the pit. They backed the truck up to the water, and then began tossing cans of paint into the pond. After the workers had thrown in fifty or so cans, however, they saw that paint was leaking from the cans into the water, so they decided instead to stack the remaining cans of paint against a nearby target shed. At the end of the day, the workers told Carr of the cans leaking into the pond, and warned him that they thought that dumping the cans into the pond was illegal. Two truckloads of paint cans remained to be moved the next day, so Carr told the workers to place those cans alongside the target shed.

Approximately two weeks later, Carr directed one of the workers to cover up the paint cans in the pond by using a tractor to dump earth into the pit. Another worker, however, subsequently triggered an investigation by reporting the disposal of the cans to his brother-in-law, a special agent with the Department of Defense. A 43-count indictment was returned against appellant, charging him with various violations of federal environmental laws. The indictment included charges under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6928(d)(2)(A), 18 U.S.C. § 2 (Counts 1–4), the CERCLA charges here at issue (Counts 5–6), and multiple charges under the Clean Water Act of 1977, 33 U.S.C. §§ 1311(a), 1319(c)(1), 18 U.S.C. § 2 (Counts 7–43). Appellant pleaded not guilty, and a 6-day trial before a jury began on October 3, 1988.

After the government had presented its evidence, it filed with the court various proposed jury instructions, including one regarding the definition of the term "in charge." Over appellant's objection, the district court gave the government's proposed instruction to the jury, essentially unchanged, as follows:

> There has been testimony that the waste paint was released from a truck assigned to the workers by the Defendant David Carr. The truck, individually, and the area of the disposal constitute facilities within the meaning of [CERCLA]. So long as the Defendant had supervisory control or was otherwise in charge of the truck or the area in question, he is responsible under this law. The Defendant is not, however, required to be the sole person in charge of the area or the vehicle. If you find that he had any authority over either the vehicle or the area, this is sufficient, regardless of whether others also exercised control.

The jury acquitted appellant of all charges except Counts 5 and 6, the CERCLA charges. The district court imposed a suspended sentence of one year's imprisonment, and sentenced appellant to one year of probation. This appeal followed.

DISCUSSION

I. *The Meaning of "In Charge" Under Section 103*

[1] Appellant raises two claims on this appeal, both of which arise out of the dis-

trict court's instruction quoted above. The first claim turns on the meaning of the statutory term "in charge." Under section 103, only those who are "in charge" of a facility must report a hazardous release. There is, however, no definition of the term "in charge" within CERCLA. Appellant argues that the district court's instruction was erroneous because Congress never intended to extend the statute's reporting requirement to those, like Carr, who are relatively low in an organization's chain of command.

Our analysis of appellant's claim requires a review of the statute and its legislative history. The language of the statute itself sheds little light on the meaning of the term "in charge." Section 103 of CERCLA states only that:

> Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to [42 U.S.C. 9602], immediately notify the National Response Center established under the Clean Water Act [33 U.S.C. 1251 et seq.] of such release. The National Response Center shall convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State.

42 U.S.C. § 9603(a) (1982).[1] The regulations implementing the statute fail to define the term "in charge." *See* 40 C.F.R. § 302 (1988) (EPA regulations). Since its meaning is unclear, we turn to the legislative history in an effort to determine the scope Congress intended the term "in charge" to have. *See Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984).

When CERCLA was enacted in late 1980, Congress sought to address the problem of hazardous pollution by creating a comprehensive and uniform system of notification, emergency governmental response, enforcement, and liability. *See generally Congress Clears "Superfund" Legislation*, 36 Congressional Quarterly Almanac 584–93 (1980) (history of the legislation). The reporting requirements established by section 103 were an important part of that effort, for they ensure that the government, once timely notified, will be able to move quickly to check the spread of a hazardous release. *See* 1 Senate Comm. on Environment and Public Works, 97th Cong., 2d Sess., *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), Public Law 96-510*, at 62 (Comm. Print 1983) [hereinafter *CERCLA Legislative History*] (June 20, 1979 testimony of Thomas C. Jorling, EPA Asst. Administrator); S.Rep. No. 848, 96th Cong., 2d Sess. 22 (1980), *reprinted in* 1 *CERCLA Legislative History*, *supra*, at 308, 329. The broad reporting requirements of section 103—which extend to anyone "in charge" of a facility—were part of the House and Senate bills from their inception, *see* H.R. 85, 96th Cong., 1st Sess. § 106 (1979), *reprinted in* 2 *CERCLA Legislative History*, *supra*, at 474, 499; S. 1480, 96th Cong., 1st Sess. § 3 (1979), *reprinted in* 1 *CERCLA Legislative History*, *supra*, at 155, 163–64, and were carried through, substantially intact, into the version of the bill finally passed into law, *see* CERCLA, Pub.L. No. 96-510, § 103, 94 Stat. 2767, 2772–73.

1. The penalties provisions of section 103 relevant herein, 42 U.S.C. § 9603(b)(3) (Supp. IV 1986), reads, in pertinent part, as follows:

> Any person—
>
> * * *
>
> (3) in charge of a facility from which a hazardous substance is released, other than a federally permitted release,
>
> in a quantity equal to or greater than that determined pursuant to [42 U.S.C. § 9602] who fails to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release ... shall, upon conviction, be fined in accordance with the applicable provisions of title 18 or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both. Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

Brown, 479 U.S. 538, 541, 107 S.Ct. 837, 839, 93 L.Ed.2d 934 (1987). First, we must focus on the specific language challenged, to determine whether it passes muster. *Id.* As the district court itself acknowledged, the language at issue likely fails this first prong. Next, we must "review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law." *Id.* (citing *Francis v. Franklin*, 471 U.S. 307, 315, 105 S.Ct. 1965, 1971, 85 L.Ed.2d 344 (1985)). The charge must be "viewed in its entirety and not on the basis of excerpts taken out of context, which might separately be open to serious question." *United States v. Clark*, 765 F.2d 297, 303 (2d Cir.1985). Considering the charge as a whole, we must attempt to discern what point of law the district court was, in fact, seeking to convey to the jury. *See United States v. Toner*, 728 F.2d 115, 124 (2d Cir.1984).

[3] A careful review of the challenged instruction indicates that the district court sought, through the charge, to explain two important principles to the jury: (1) that the appellant must have exercised supervisory control over the facility in order to be held criminally liable for his failure to report the release, but (2) that the appellant need not have exercised *sole* control over the facility. By taking the language of the instruction out of context—by focusing too narrowly on the district court's use of the word "any"—appellant ignores the broader point that the district court was attempting to make to the jury. The court had already explained that the appellant must have had "supervisory control" over the facility in order to be found guilty. The subsequent, challenged portion of the instruction was therefore not directed at the breadth of authority that appellant must have had, but instead was intended to make clear that the appellant need not have been the sole person in charge of the facility. Viewing the challenged language within the context of the charge as a whole rather than in "artificial isolation," *see Cupp v. Naughten*, 414 U.S. 141, 146–47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973), we hold that the instruction, though not ideal, was not erroneous.

CONCLUSION

We have reviewed all of appellant's other arguments on appeal, and consider them to be without merit. The judgment of the district court is, therefore, affirmed.

Richard LEBERMAN,
Plaintiff-Appellee,

v.

JOHN BLAIR & COMPANY,
Defendant-Appellant.

No. 1075, Docket 89-7075.

United States Court of Appeals,
Second Circuit.

Argued April 28, 1989.

Decided July 25, 1989.

Former employee brought action against former employer to recover severance payments. The United States District Court for the Southern District of New York, Shirley Wohl Kram, J., awarded former employee damages. Former employer appealed. The Court of Appeals, Meskill, Circuit Judge, held that genuine issues of material fact existed as to whether terms of employment severance agreement were superseded by another agreement and whether severed employee acted in good faith in determining amount of severance pay that he was owed, precluding summary judgment.

Reversed and remanded.

1. Federal Civil Procedure ⇐2497

Genuine issues of material fact existed as to whether terms of employment severance agreement were superseded by another agreement and whether severed employee acted in good faith in determining